Cap. U. L. Rev. 455, 474 (2002) [hereinafter *Independence and Democratic Accountability*] ("The expensiveness of media campaigns has the dramatic effect of forcing not only judicial candidates but sitting judges hoping for re-election to seek and accumulate large campaign war chests.").

Studies show that most of the money financing Supreme Court campaigns is raised from persons and entities who regularly appear in court. *See id.* ("Often, lawyers or litigants who are likely to appear before the judge constitute large proportions of the contributions to judicial candidates."). From 1989 through 2000, nearly half of all contributions to Supreme Court candidates came from attorneys and business. *New Politics 2000* at 9. In 2002, two thirds came from those sources. *New Politics 2002* at 18. Approximately 60 percent of funds raised by candidates in 2004 came from business and lawyers, with millions of additional dollars funneled through political parties and interest group associations. *New Politics 2004*, at 20, 26, 27 & Figs. 14, 17, 18.

> The result can be an unhealthy dependence between judicial candidates and interest groups where interest groups back judicial candidates to secure their political agendas and candidates rely on interest group backing to achieve an to retain judicial office.

Anthony Champagne, *Interest Groups and Judicial Elections*, 34 Loy. L.A. L. Rev. 1391, 1393 (2001) [hereinafter *Interest Groups*]. That visible dependence prompts complaints that candidates "sully the court's reputation by raising millions of dollars from parties and lawyers who have business before the court." Texans for Public Justice, *Payola Justice* (1998), *at* http://www.tpj.org/docs/1998/02/reports/payola/conclusions.html. Without spending limits, candidates of high integrity are sullied by a campaign finance system that leaves them no

choice but to raise as much as they can to ward off defeat or to win a seat.

### B. The Unlimited Money Chase in Contemporary Judicial Elections Undermines Public Confidence in the Courts.

The rapid spread of highly visible, expensive campaigns for the bench, financed by groups and individuals with stakes in the outcome of judicial decision-making, is taking a toll on the courts. Survey research has shown that 76 percent of registered voters believe that campaign contributions influence judges' decisions. Greenberg Quinlan Rosner Research & American Viewpoint, National Public Opinion Survey, Frequency Questionnaire at 4 (2001), *at* http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf. Two-thirds of all voters believe that litigants who have made campaign contributions to judges often receive favorable treatment. *See id.* at 7. A similar poll in 1999 found that 81 percent of the public thought that political considerations influence judge's decisions, and 78 percent believed that elected judges are influenced by having to raise campaign funds. *See* National Center for State Courts, *How the Public Views the State Courts: A 1999 National Survey*, *at* http://www.ncsc.dni.us/ptc/ptc.htm.

Such statistics do not surprise the former Chief Justice of the (elected) Texas Supreme Court. He asks: "How can judges convince the public that their only constituency is the law when their tenure in office depends on campaign contributions from lawyers and litigants?" Hon. Thomas R. Phillips, *Electoral Accountability and Judicial Independence*, 64 Ohio St. L.J. 137, 144 (2003) [hereinafter *Electoral Accountability*]. Referring to the "obscene" amount of money spent on an Illinois Supreme Court race this year, the winning candidate asked, "What does it gain the people? How can people have faith in the system?" Ryan Keith,

*Spending for Supreme Court Seat Renews Cry for Finance Reform*, Associated Press, November 3, 2004.

The general public perception is shared, to a lesser but still alarming extent, by individuals with extensive experience in our justice system. Fully 26 percent of state court *judges* agreed that campaign contributions have more than a little influence on decisions. Greenberg Quinlan Rosner Research & American Viewpoint, National Public Opinion Survey, Frequency Questionnaire at 5 (2002), *at* http://faircourts.org/files/JASJudgesSurveyResults.pdf. A 1999 survey of Texas state judges conducted by that state's Supreme Court and its bar association found that nearly half believed contributions had a significant effect on courtroom decisions. Texas Office of Court Administration & State Bar of Texas, *The Courts and the Legal Profession in Texas—The Insider's Perspective: A Survey of Judges, Court Personnel, and Attorneys*, Executive Summary 5 (1999). Anecdotal evidence suggests that lawyers, too, believe that their contributions to judges affect their chances of success in court. David Barnhizer, *"On the Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 Cath. U. L. Rev. 361, 379 (2001) [hereinafter *On the Make*].

Even if trust in government is declining generally, erosion of confidence in the courts is of particular concern. "That is because the authority of 'the least dangerous branch' rests almost entirely on the voluntary compliance with its rulings by the other branches of government and by the public at large." *Electoral Accountability*, at 144. Without public confidence in the fairness and impartiality of our courts, the rule of law is at risk.

### C. This Court Should Grant Writs of Certiorari to Clarify the Application of *Buckley* to Circumstances Not Considered in That Case.

Judicial campaigns were not always contentious and expensive. "The old style of judicial campaign was a low budget affair where the judicial candidate spoke to any group willing to hear a dull speech about improving the judiciary or about judicial qualifications." *Interest Groups*, at 1393. The large campaign contributions and scandals of the Watergate years that motivated Congress to enact spending limits in the 1974 amendments to the Federal Election Campaign Act were confined at that time to elections for legislative and executive office. "Judicial campaigns first experienced [soaring spending] in only a few states, starting in the early 1980s." Roy A. Schotland, *Campaign Finance in Judicial Elections*, 34 Loy. L.A. L. Rev. 1489, 1489 (2001). *Buckley* thus did not and could not consider the special threats presented by uncontrolled fundraising in judicial elections when examining the state interests that might justify spending limits.

Notwithstanding this history, courts adjudicating the constitutionality of spending limits in judicial campaigns have interpreted *Buckley* to preclude such caps. *See Suster v. Marshall*, 149 F.3d 523, 529 (6th Cir. 1999), *aff'g*, 951 F. Supp. 693 (N.D. Ohio 1996). According to *Suster*, when considering the constitutionality of expenditure ceilings, "the prevention of corruption is the only interest the Supreme Court has and, hence, this Court will give credence," *id.* at 532, and every other justification must be summarily dismissed "irrespective of the *kind* of position sought," *id.* at 530. But the *White* Court has since declared, "we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." 536 U.S. at 783. This Court should therefore grant the petitions (as to Question 1) and the

conditional cross petitions for writs of certiorari in these cases to clarify that *Buckley* does not preclude consideration of the new and unique threats presented by uncontrolled fundraising from special interests in campaigns for the bench or the unique rationales for spending limits in those campaigns. If *Buckley* does represent that absolute bar, the writs should be granted to reconsider *Buckley*.

## II. Limits on Spending in Judicial Campaigns Are Supported by Especially Compelling Interests Not Considered in *Buckley*.

*Buckley* considered and rejected three interests proffered in defense of spending limits in federal campaigns for executive and legislative office. 424 U.S. at 39-59. But "*Buckley*'s rejection of expenditure restrictions for presidential and congressional elections is distinguishable because of the unique nature of the judicial role and the importance of judicial independence." Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 Chi.-Kent l. Rev. 133, 135 (1998) [hereinafter *Preserving an Independent Judiciary*]. In addition to the interest in judicial independence, the interests in judicial impartiality and the appearance of independence and impartiality, *see* J.J. Gass, *After* White: *Defending and Amending the Canons of Judicial Ethics* (Brennan Center for Justice 2004), *at* http://www.brennancenter.org/resources/ji/ji4.pdf (defining the three separate interests) [hereinafter *After* White], also provide grounds for distinguishing *Buckley*. Deborah Goldberg, *Public Funding of Judicial Elections: The Role of Judges and the Rules of Campaign Finance*, 64 Ohio St. L. J. 95, 116-17 (2003) ("[T]he state interests uniquely implicated in [campaigns for the bench] provide a compelling justification for limiting spending by judicial candidates."). Because courts reviewing the constitutionality of spending limits in judicial elections have rejected consideration of any

justifications not explicitly endorsed by the *Buckley* Court, writs of certiorari should be granted in these cases to eliminate any confusion about the nature of the interests that might justify caps on spending in specialized contexts.

### A. Courts Should Be Permitted to Consider Whether the Interest in Judicial Impartiality Supports Spending Limits in Campaigns for the Bench.

The mandate for judicial impartiality is implicit in the Due Process Clause of the U.S. Constitution. *See In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). As one court has recently affirmed, "litigants have a right guaranteed under the Due Process Clause to a fair and impartial magistrate and the State, as the steward of the judicial system, has the obligation to create such a forum . . . ." *Raab v. State Comm'n on Judicial Conduct*, 793 N.E.2d 1287, 1290-91 (N.Y. 2003). Although the term "impartiality" may be understood in a variety of ways, *see White*, 536 U.S. at 775-78; Ofer Raban, *Judicial Impartiality and the Regulation of Judicial Election Campaigns*, 15 U. Fla. J.L. & Pub. Pol'y 205, 21-19 (2004) (criticizing *White*'s analysis of impartiality), under one common post-*White* construction, impartiality is a compelling interest that may well support spending limits in judicial campaigns.

Since *White*, courts have recognized that impartiality precludes judges "from binding themselves, or appearing to bind themselves, to take action against particular *kinds* of parties." *After* White at 7 (emphasis added). On this understanding, admitted favoritism toward law enforcement in criminal cases is inconsistent with impartiality. *See Watson v. State Comm'n on Judicial Conduct*, 794 N.E.2d 1, 4-5 (N.Y. 2003); *In re Kinsey*, 852 So. 2d 77, 88-89 (Fla.), *cert. denied*, 124 S. Ct. 180 (2003). Impartiality would also

foreclose a preference for plaintiffs or defendants in tort cases.

But the dynamics of modern judicial elections press candidates for the bench toward precisely this form of bias. The unlimited demand for funds inherent in any campaign finance system without expenditure ceilings forces candidates to accept large sums from well-defined special interests, whether plaintiff-side personal injury lawyers or defense-side corporate lawyers. *Compare Independence and Democratic Accountability* at 474 (describing trial lawyer contributions) *with Preserving an Independent Judiciary* at 137 (describing contributions from corporate defense lawyers). We cannot assume that judges will ignore the prospect of losing that support in the next election if they fail to meet contributors' expectations. To reduce the demand for campaign funds and thereby combat that threat to impartiality, courts should be permitted to consider whether limits on judicial campaign spending are constitutional.

### B. Courts Should Be Permitted to Consider Whether the Interest in Judicial Independence Supports Spending Limits in Campaigns for the Bench.

Like "impartiality," judicial "independence" is also susceptible to various interpretations, and the two terms are sometimes used interchangeably. *See White*, 536 U.S. at 775 n.6. But when "independence" is not used merely as a synonym for "impartiality," it speaks to a second value of constitutional significance—the principle of separation of powers. *See Griffen v. Ark. Judicial Discipline & Disability Comm'n*, 130 S.W.3d 524, 532 (Ark. 2003) ("Judicial independence is a hallmark of our system of government, and we cannot abide . . . entanglements between the judicial and other branches of government . . . .").

> An independent judiciary is: (1) not dominated by or dependent on the other two branches of government; (2) not unduly entangled in the political machinery of the other branches . . . ; and (3) not actuated in its decision-making process by the same considerations and interests as the other branches.

*After* White at 8. At the very least, the third aspect of judicial independence is implicated in the financing of campaigns for the bench.

Judicial campaign finance systems that require candidates to collect unlimited numbers of private contributions give enormous power to wealthy interest groups. The control by those groups over the large sums needed for campaigns carries with it the ability to influence the pool of judicial candidates. Candidates whose commitment to considering each case on its merits is demonstrably paramount will be less likely to attract support than candidates who give priority to political considerations. Increasingly, the distinction between the judiciary and the other branches of government—a distinction that enables courts to serve as a check on executive and legislative power—will be blurred. For this reason, too, courts should be permitted to consider whether limits on judicial campaign spending are constitutional.

### C. Courts Should Be Permitted to Consider Whether the Interest in the Appearance of Impartiality and Independence Supports Spending Limits in Campaigns for the Bench.

The interest in the appearance of impartiality and independence is a third and distinct interest that may support spending limits in judicial elections. As this Court has recognized: "The Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do

their very best to weigh the scales of justice equally between the contending parties." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (internal quotation omitted). Appearances count because "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

That reputation has been besmirched by the influence of money in judicial elections. The unlimited fundraising from special interests on both sides of various policy debates has drawn accusations of "capture" and "legalized bribery." *On the Make* at 361, 427. There is a compelling interest in stemming this loss of trust, because "without public confidence the judicial branch could not function." Hon. William H. Rehnquist, *Keynote Address at the Washington College of Law Centennial Celebration*, 46 Am. U.L. Rev. 263, 274 (1996). Combating threats to the appearance of impartiality and independence represents a third compelling interest potentially justifying limits on spending in judicial elections. This Court should grant the petitions (as to Question 1) and the conditional cross petitions for writs of certiorari in these cases to clarify that *Buckley* does not preclude consideration of that interest or, if such consideration is barred, to revisit *Buckley*.

## CONCLUSION

The changed circumstances of judicial elections over recent years and the distinct interests supporting spending limits in campaigns for the bench argue for allowing states to make the case for caps on judicial spending. As long as the ceilings are high enough to ensure that all candidates can convey their message to voters, due process concerns for the impartiality and independence of the courts—in reality and appearance—should overcome burdens on the candidates' First Amendment rights. But as *Buckley* has been interpreted

by the Sixth Circuit in *Suster* and the Tenth Circuit in *Homans*, the door is closed to such arguments. The instant petitions (in Question 1) and conditional cross petitions present a rare opportunity to revisit that reading of *Buckley* and to resolve a split among the circuits created by the Second Circuit in these cases. *Amici* understand that these cases do not directly concern judicial elections. But *Amici* respectfully request that the Court grant the petitions (as to Question 1) and the conditional cross petitions for writs of certiorari in these cases to clarify whether *Buckley* presents an absolute bar to consideration of new facts and new state interests when reviewing the constitutionality of spending limits and, if such consideration is foreclosed, to revisit *Buckley*.

Respectfully submitted,

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June 15, 2005

Supreme Court, U.S.
FILED
JUN 15 2005
OFFICE OF THE CLERK

Nos. 04-1528 & 04-1530

IN THE

# Supreme Court of the United States

NEIL RANDALL, *et al.*,

*Petitioners,*

*v.*

WILLIAM SORRELL, *et al.*,

*Respondents.*

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,

*Petitioners,*

*v.*

WILLIAM SORRELL, *et al.*,

*Respondents.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; THE FANNIE LOU HAMER PROJECT; THE EQUAL JUSTICE SOCIETY; AND THE GREENLINING INSTITUTE IN SUPPORT OF RESPONDENTS-CONDITIONAL CROSS PETITIONERS AND RESPONDENTS-INTERVENORS-CONDITIONAL CROSS PETITIONERS**

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## INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, the National Association for the Advancement of Colored People, the Fannie Lou Hamer Project, the Equal Justice Society, and the Greenlining Institute (a coalition of community-based organizations of color) respectfully submit this brief *amici curiae* in support of Respondents-Conditional Cross Petitioners and Respondents-Intervenors-Conditional Cross Petitioners.[1]

*Amici* are organizations dedicated to improving the quality of life and the full participation in the political system of African American, Native American, Asian American/Pacific Islander and Latino communities. *Amici* represent communities of color with the highest levels of poverty, environmental pollutants, infant mortality, and crime, as well as the lowest levels of employment, education and home ownership. *Amici* are confident that this situation can and will be changed when the electoral process gives them real access to political office, to elected officials, and to meaningful campaign participation.

## SUMMARY OF ARGUMENT

Forty years ago, America celebrated the passage of the Voting Rights Act of 1965—a hard won promise of democratic inclusion and political equality for African Americans and other minority communities. Civil rights pioneers—many then members of organizations that today file this *amicus curiae* brief—devoted their lives to delivery

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[1] Pursuant to Supreme Court Rule 37.2(a), *Amici* filed this brief with the written consent of all parties. Pursuant to Rule 37.6, *Amici* confirm that no counsel for a party authored this brief in whole or in part and that no person other than *Amici* and their counsel made a monetary contribution to its preparation or submission.

of the franchise to members of our democratic society who had been effectively excluded from the political process. The Voting Rights Act and federal enforcement methods provided these newly-empowered voting rights activists with powerful tools to combat systemic vote dilution and suppression. A series of cases in this Court decisively supported that effort and that outcome.[2]

Forty years later, these organizations file this *amici curiae* brief to make it clear that one of the most critical civil rights issues facing American politics today is the virtual exclusion of communities of color and the poor from the political process because of the unlimited, runaway costs of campaigns for elected office.[3] Access, influence and public office are the private reserve of those who can compete in this race for campaign funds. And the interests of those who are able to participate are often very different from those who are members of *Amici* organizations on issues of health care,

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[2] *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *Hadnott v. Amos*, 394 U.S. 358 (1969); *Gaston County v. United States*, 395 U.S. 285 (1969); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953).

[3] Despite the fact that racial minorities make up nearly 1/3 of the United States population, there is currently only one African American Senator and no Latino United States Senators, and only 1/6 of the United States House of Representatives are people of color. For statistics on population by race, *see* OVERVIEW OF RACE AND HISPANIC ORIGIN, *available at* http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf; for statistics on the racial make-up of the Congress, *see* MILDRED L. AMER, CONGRESSIONAL RESEARCH SERVICE, MEMBERSHIP OF THE 108TH CONGRESS: A PROFILE, *available at* http://www.senate.gov/reference/resources/pdf/RS21379.pdf.

wages, taxes, public schools, farm and factory conditions, public benefits, affirmative action, neighborhood safety, the environment and equal justice.

It is the unified position of the organizations who respectfully file this brief that properly tailored campaign expenditure limits are both constitutionally permissible *and necessary* to ensure that all Americans have equal footing in our Nation's process of governance. The Court of Appeals for the Second Circuit correctly held that neither the seminal campaign finance case, *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), nor any subsequent opinion of this Court, impose an absolute bar to limits on campaign expenditures. Rather, after *Buckley*, both factual and legal grounds remain on which expenditure limits may survive constitutional review. As the Second Circuit held in this case, the Vermont Legislature established at least two interests to maintain campaign expenditure limits: deterring corruption and its appearance and protecting the time of candidates and elected officials. *Landell v. Sorrell*, 382 F.3d 91, 124 (2d Cir. 2004).

*Buckley* was decided in 1976—nearly thirty years ago. The campaign expenditure limits at issue then were struck down because this Court determined that legitimate goals could be accomplished through campaign contribution limits and disclosure only. As experience and the record below show, however, contribution limits alone have not been enough.[4]

In the three decades since *Buckley* was decided, the swiftly escalating levels of campaign fundraising and spending have fueled the erosion of citizen participation and

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[4] The 2004 election has broken all spending records. Candidates for federal office have spent $3.9 billion, a 30% increase over the $3 billion spent on federal elections four years ago. Center for Responsive Politics, *'04 Elections Expected to Cost Nearly $4 Billion* (Oct. 21, 2004 Press Release).

confidence in the electoral process. In Vermont, citizens expressed deep concerns that moneyed interests wielded inordinate influence over the political system and that ordinary voters could not compete. *Id.* at 100, 116. Vermont's elected officials were increasingly being forced to provide "privileged access to contributors *in exchange* for campaign money." *Id.* at 125 (emphasis in original). One former Vermont elected official testified that campaigns had come to reflect an "arms race" in spending that took elected officials away from their official duties to the public. *Id.* at 123. These concerns, along with many others, were precisely what sparked the passage of Vermont's campaign finance law, Act 64, in 1997 by bipartisan majorities in both houses of the Vermont Legislature.

These unparalleled and ever-increasing levels of campaign fundraising and spending also have severely restricted the access of minority and low-income communities to the political process. Minorities, who are overrepresented among the lowest economic levels in America, are largely left out of this critical political arena because making significant campaign contributions requires the type of disposable income that few minorities possess. Despite the gains of the Civil Rights Movement, minorities have lower incomes and less financial wealth than whites, control fewer business interests, and are disproportionately represented among those living in poverty.

For these reasons, furthering realistic opportunities for minority and low-income participation in the political arena should be recognized as an additional basis for reasonable limits on campaign spending. The local, state, and national electorate have a strong and legitimate interest in promoting equal participation, the openness and fairness of government, and the absence of corruption that can be best served by contribution *and expenditure* limits carefully calibrated to respect candidates' rights to freely express their ideas and positions.

## ARGUMENT

### I. In The Decades After *Buckley v. Valeo*, Dramatically Escalating Pressures To Raise And Spend Exorbitant Amounts To Maintain Viable Candidacies Are Denying Many Americans Fair And Meaningful Participation In The Democratic Process.

The Court of Appeals for the Second Circuit correctly held that neither the seminal 1976 campaign finance case, *Buckley v. Valeo*, nor any subsequent opinion of this Court, rendered campaign expenditure limits *per se* unconstitutional. In *Buckley*, this Court acknowledged that the problems of corruption and the appearance of corruption in electoral politics were severe enough to justify Congress' passage of certain regulations that restricted First Amendment rights. *Buckley*, 424 U.S. at 26–27, 45. This Court struck down the campaign expenditure limits at issue, however, because it determined that campaign contribution limits and disclosure alone were sufficient to limit the improper influence of money in elections. As experience and the record below show, however, things have not turned out that way. Indeed, as the Second Circuit noted, "an unyielding interpretation of *Buckley* that expenditure limits are *per se* unconstitutional . . . would require us to ignore not only *Buckley*'s own language, but also over three decades of experience as to how the campaign funds race has affected public confidence and representative democracy." *Landell*, 382 F.3d at 110.

#### A. The Unparalleled and Escalating Levels Of Campaign Spending Erode Public Confidence and Imperil the Quality of Democratic Representation.

The powerful evidence considered by the Vermont Legislature and the District Court in support of Act 64's campaign expenditure limits demonstrates that the increasing